Supreme Court, U.S.
FILED
AUG 22 2002
OFFICE OF THE CLERK

(3)

No. 02-71

In the Supreme Court of the United States

1-800-FLOWERS.COM, INCORPORATED,
FRESH INTELLECTUAL PROPERTIES, INCORPORATED,
AND 800-FLOWERS, INCORPORATED,
Petitioners,

v.

CURTIS P. JAHN AND
CAPITOL WAREHOUSING CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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10 pp

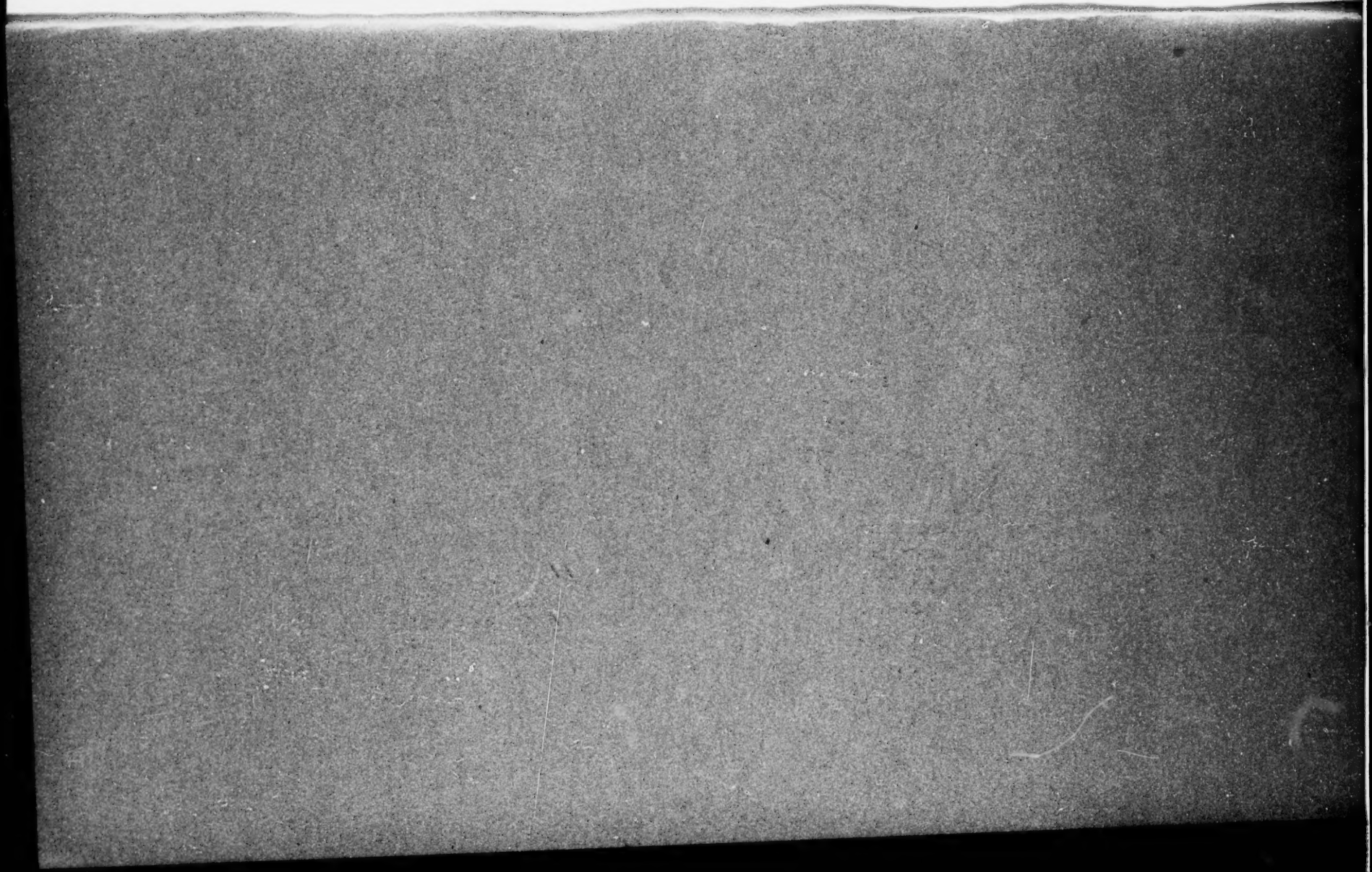


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REPLY FOR PETITIONER

Respondents take great pains to portray this case as too complicated and unique for review. Eschewing any citations to the record, respondents state "facts" that are completely contrary to the uncontested findings of the district court. *Compare, e.g.*, Brief in Opposition ("Opp.") 9 (describing the royalty as consideration "for the sale of a business") *with* App. 25a (finding that the "royalty was paid as consideration for plaintiffs' transfer of the FLOWERS [toll free] number"). Fanning the smoke a little further, they recite a history of the reselling of phone *service* that is completely unrelated to the FCC rule prohibiting sale of a phone *number* at issue here. Opp. 3. To complete the misdirection, respondents repeatedly stress the mantra that the public policy behind the FCC rule was to protect scarce resources.

The essential facts and the law are much more straightforward: Jahn sold a toll-free phone number in exchange for perpetual royalty payments; the FCC later promulgated a rule formalizing its long-standing policy against the sale of a phone number for a fee; the continuing obligation to pay Jahn for the sale of the toll-free number violates both that FCC rule and policy; and Jahn nevertheless seeks to enforce a contract requiring such future payment. The discrete, basic facts provide this Court with a solid foundation for (1) resolving a conflict in the circuits over the requirement of congressional authorization for administrative rules affecting future consequences (secondary retroactivity) and those affecting completed events (primary retroactivity), and (2) affirming the continued vitality of this Court's historic decisions rejecting enforcement of contracts that violate public policy. Both are sufficiently important issues to justify granting certiorari.

i. The FCC policy expressly prohibits the sale of a single toll free number.

Claiming that petitioners have "mischaracterized the public policy," respondents go through a detailed exposition on the "history behind the enactment of 47 C.F.R. § 52.107" to "reveal" what they claim is the real public policy behind the ban on toll-free number sales. Opp. 4-5. Finding that policy to be the "orderly allocation of scarce resources," respondents then argue that applying the ban on sales of toll-free numbers to Jahn's sale does not implicate the allocation of scarce resources. Opp. 5-6. One little sale, they argue, hardly "accelerate[s] the depletion of toll-free numbers." Opp. 5.

That is not what the FCC says. In its *Second Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Toll Free Service Access Codes,* 12 F.C.C.R. 11,162 at 11,186 (Apr. 11, 1997) (*"Second Report and Order"*), the FCC concluded that the sale of even a single number by a private entity for a fee offends the public interest because it "provides motivation for hoarding and therefore results in quicker exhaustion" and "interferes with the orderly allocation of numbering resources." *Id.* at 11,189. Indeed, the FCC confirmed its intent to apply its rule to the sale of a single number within days of the rule's effective date. *See FCC Letter to Mr. Joseph Weiss*, 13 F.C.C.R. 4122 (June 13, 1997) (applying rule to circumstances involving attempted transfer of a single toll free number for profit and admonishing Weiss for treating a toll free number as a commodity).

2. Respondents are "toll free subscribers" as defined by the rule.

Respondents also argue that the FCC rule does not apply to them because Jahn and Capitol Warehousing were not "toll free subscribers" within the meaning of 47 C.F.R. § 52.107, and because the "Responsible Organizations" and "SMS Database" referenced in the rule did not exist in the 1980s. Opp. 10. That argument places an unreasonably narrow construction on the rule. The reference to "Responsible Organizations" or "RespOrgs" and to "SMS Database" or "SMS" in the definition of "subscriber" merely reflects the current terminology used to describe one who receives a toll free number from a provider. The fact that toll free numbers were allocated by AT&T (which under today's regulatory scheme is a RespOrg) when the FLOWERS toll free number was originally assigned to Jahn in 1976 does not render him something other than a subscriber of toll free service under the rule.

Even if 47 C.F.R. § 52.107(a) were construed not to reach beyond current subscribers, the tariff provision in § 52.107(b), which the FCC expressly mandates "be included in the Service Management System tariff and in the local exchange carriers' toll free database access tariffs," prohibits the act of selling a toll free number for a fee:

> The Federal Communications Commission ("FCC") has concluded that hoarding, defined as the acquisition of more toll free numbers than one intends to use for the provision of toll free service, *as well as the sale of a toll free number by a private entity for a fee*, is contrary to the public interest in the conservation of the scarce toll free number

> resource and contrary to the FCC's responsibility to promote the orderly use and allocation of toll free numbers.

47 C.F.R. § 52.107(b) (emphasis added).

Moreover, contrary to respondents' assertion, nothing in the rule limits its application to those who sold a number after the rule's promulgation. Indeed, the FCC has applied the 1997 rule to conduct that predates its enactment. *See Patients Plus, Inc. v. Long Distance Telecomms. Serv. Inc.*, 13 F.C.C.R. 5827 (Aug. 28, 1997) (applying the rule to conduct which occurred between 1991-1993); *FCC Letter to Mr. Joseph J. Weiss,* 13 F.C.C.R. 4122 (June 13, 1997) (applying the rule and admonishing conduct which occurred in 1996).

3. The secondary retroactivity issue is ripe for review.

Respondents also point out that petitioners did not raise the primary versus secondary retroactivity argument until their petition for rehearing. Opp. 6. For good reason: the distinction did not come into play until the Seventh Circuit - addressing an issue of retroactivity that the district court found no need to reach - held that express congressional authorization was required for the FCC rule to apply to Jahn's sale of a toll-free number. App. 8a. Such authorization is needed only for rules with primary retroactivity (Pet. 6-8); until the Seventh Circuit *sua sponte* raised the requirement of express congressional authorization, the distinction between primary and secondary retroactivity was not an issue. Moreover, petitioners gave the Seventh Circuit the opportunity to address the distinction by briefing the issue in a petition for rehearing.

4. The FCC rule is reasonable and should be enforced against an assertion of retroactivity.

Respondents erroneously argue that the FCC rule is unenforceable under the rules of retroactivity. First, the Seventh Circuit's decision is inconsistent with this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). Under the holding of that case, a rule is impermissibly retroactive only if it creates new legal consequences for events *completed* before its enactment. *See* Pet. 9-10. In this case, the relevant events are by definition not completed because respondents chose to take payment in the form of perpetual royalties for the sale of the toll-free number. Petitioners seek only to void any obligation to make future payments.

Second, if this Court expressly adopts Justice Scalia's distinction between primary and secondary retroactivity, as have the D.C. and Ninth Circuits (Pet. at 7), then the Seventh Circuit's decision must be reversed because the FCC's rule is plainly a reasonable exercise of that agency's authority. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring). Under Justice Scalia's "reasonableness" test, a rule with only secondary retroactive effects will be upheld if it is not arbitrary and capricious. *Bowen*, 488 U.S. at 220. In this instance, the FCC has articulated a persuasive rationale for prohibiting the sale of toll-free phone numbers: the sale of even a single number by a private entity for a fee offends the public interest because it "provides the motivation for hoarding and therefore results in quicker exhaustion" and "interferes with the orderly allocation of numbering resources." *Second Report and Order* at 11,189.

5. Contracts that violate federal law and public policy should not be enforced.

Respondents do not even address the Seventh Circuit's conflict with this Court's decisions forbidding enforcement of private contracts that violate federal law and policy. *See* Pet. 10-13. Even if a contract is lawful when made, federal courts may not enforce it if enforcement would violate federal law or frustrate public policy - even if that law or policy was promulgated or announced after the contract was entered. *See, e.g., W.R. Grace & Co. v. Local Union* 759, 461 U.S. 757 (1983); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307, 308, 311 (1935); *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 485 (1911). The Seventh Circuit ignored this historic rule. This Court now has the opportunity to emphasize the importance and continuing vitality of these earlier decisions.

CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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August 20, 2002